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No. 89-12

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARITA RICHARDSON, *et al.*,

Petitioners,

v.

RICHARDSON-MERRELL INC.,

Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT IN RESPONSE TO THE BRIEF AMICUS CURIAE FILED BY THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
A. The *Richardson* Court did not Hold That Under Rule 703 an Expert's Opinion Must not Conflict With the Scientific Consensus	1
B. The *Richardson* Decision did not Restrict the Substantive State Law of Torts	3
CONCLUSION	4

TABLE OF AUTHORITIES

Cases Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 1

Hanna v. Plumer, 380 U.S. 460 (1965) 3

In re Agent Orange Product Liability Litigation, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987) 2

In re Air Crash Disaster at New Orleans, La., 795 F.2d 1230 (5th Cir. 1986) 3,4

Richardson v. Richardson-Merrell Inc., 857 F.2d 823 (1988), *petition for reh'g and suggestion for reh'g en banc denied*, No. 87-7023 (Apr. 6, 1989) ..... *passim*

Rules

Fed. R. Civ. P. 50(b) 2

Fed. R. Evid. 702 1

Fed. R. Evid. 703 1,2,3

This supplemental brief is respectfully submitted by Respondent Merrell Dow Pharmaceuticals Inc. to respond briefly to two new arguments contained in the brief *amicus curiae* filed on August 4, 1989 by the Association of Trial Lawyers of America ("ATLA").[1]

A. The *Richardson* Court did not Hold That Under Rule 703 an Expert's Opinion Must not Conflict With the Scientific Consensus

ATLA claims that the *Richardson* decision conflicts with Rules 702 and 703 of the Federal Rules of Evidence. This argument is based solely upon ATLA's contention that the Court of Appeals construed these Rules to require "that an expert's conclusions, to be credible as a matter of law, must not conflict with a wide consensus in the scientific field." (ATLA Br., p. 3). Nothing in the *Richardson* opinion interprets Rules 702 or 703 as imposing this requirement—ATLA has simply manufactured a holding that does not exist.

The *Richardson* Court based its decision upon this Court's ruling in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986), which held that no issue for trial is presented unless there is sufficient evidence to support a jury verdict. Accordingly, the Court of Appeals examined whether "there was *sufficient evidence* upon which a jury could properly base a verdict for the Richardsons." 857 F.2d at 828 (A-12) (emphasis in original). The *Richardson* Court reviewed all the scientific evidence presented by the plaintiffs, including the evidence presented by plaintiffs in the

[1] The ATLA brief was filed along with a Motion for Leave to File Brief Amicus Curiae. Respondent received a copy of these papers with the attached brief on the same day that it filed its Opposition to Petition for Writ of Certiorari.

form of an expert's opinion. The Court of Appeals found that under Rule 50(b) of the Federal Rules of Civil Procedure plaintiffs' evidence as a whole was insufficient to allow the jury verdict to stand.

In reaching this conclusion, the Court of Appeals carefully reviewed the scientific foundation for Dr. Done's opinion to determine whether, in the language of Rule 703, it was based on grounds "of a type reasonably relied upon by experts in the particular field." 857 F.2d at 829 (A-14). Dr. Done's opinion evidence concerning Bendectin was rejected because it did not have an adequate basis, not because it conflicted with the consensus in the scientific community:

> We conclude that Dr. Done's opinion lacks an adequate basis and therefore, whether viewed alone or in conjunction with those of the other experts, did not provide the "substantial probative evidence" that would require us to leave the verdict as the jury rendered it.

857 F.2d at 829 (A-13).[2]

Contrary to ATLA's contention, Rule 703 does not require a Federal court automatically to accept expert opinion evidence when given by a qualified expert in a relevant area (ATLA Br., p. 6). This construction

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[2] ATLA agrees that a court may exclude expert testimony which has no basis: "Where the basis [is] so deficient experts would not rely upon it in their professional activities outside the courtroom, the trial judge may properly exclude the expert's opinion. *See e.g., In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2nd Cir. 1987)." (ATLA Br., pp. 8-9).

would eliminate Rule 703's requirement that to be admissible, the opinion must be based on grounds "of a type reasonably relied upon by experts." The *Richardson* Court never stated that if an expert's opinion had an adequate basis it could be rejected solely because it was not in accord with the scientific consensus. Rather, the Court stated that based on its analysis of the facts *in this case* the opinion evidence presented by Dr. Done did not have an adequate basis and, therefore, the grounds relied upon by Dr. Done for his opinion were not "of a type reasonably relied upon by experts in the field."

B. The *Richardson* Decision did not Restrict the Substantive State Law of Torts

There is no basis for ATLA's argument that the *Richardson* Court has impermissibly restricted the substantive state law of torts (ATLA Br., pp. 12-15). This argument is merely a restatement of the *Erie* argument already raised by Petitioners. The Court of Appeals in *Richardson* properly applied the Federal Rules of Civil Procedure and the Federal Rules of Evidence to the facts presented by the parties as required by *Hanna v. Plumer*, 380 U.S. 460 (1965). The application of these Rules is a procedural matter and *Erie* does not apply. (*See* Respondent's Opposition, pp. 8-11). ATLA's citation of *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230 (5th Cir. 1986) (Higginbotham, J.), does not support a contrary position. In that case the Fifth Circuit specifically held that expert testimony was inadmissible because it lacked an adequate basis and was speculative:

> In sum, we adhere to the deferential standard for review of decisions regarding the ad-

> mission of testimony by experts. Nevertheless, we take this occasion to caution that the standard leaves appellate judges with a considerable task. We will turn to that task with a sharp eye, particularly in those instances, hopefully few, where the record makes it evident that the decision to receive expert testimony was simply tossed off to the jury under a "let it all in" philosophy. Our message to our able trial colleagues: it is time to take hold of expert testimony in Federal trials.

795 F.2d at 1234.

CONCLUSION

For all of the aforementioned reasons, the petition for writ of certiorari should be denied.

Dated: August 11, 1989

Respectfully submitted,

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